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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 791.

STATE OF OHIO,
Appellee,

vs.

FRANK CICKELLI,
Appellant.

MOTION TO DISMISS
and
BRIEF IN SUPPORT OF MOTION.

LYNN B. GRIFFITH, JR.,
Prosecuting Attorney of Trumbull County, Ohio,
Court House, Warren, Ohio,
Counsel for Appellee.

JAMES F. BELL,
50 W. Gay Street,
Columbus, Ohio,
Counsel for Appellant.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-0847

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STATE OF OHIO,
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Appellant.

MOTION TO DISMISS.

Now comes the Plaintiff-Appellee, State of Ohio, and respectfully moves this Court to dismiss the appeal of the Defendant-Appellant, Frank Cickelli, for the reason that the judgment appealed from does not present a substantial federal question.

I. QUESTIONS PRESENTED.

Three questions presented by this appeal are as follows:

(A) Was Appellant deprived of his rights under the Fourteenth Amendment to the Constitution of the United States, by a claimed irregularity in the selection of the grand jury, when he failed to raise this issue in accordance with the applicable statutes and laws of the State of Ohio, and when the record of the case is void of any evidence of the alleged irregularity in the selection of the grand jury?

(B) Was the Appellant twice placed in jeopardy for a single offense, contrary to the Fifth Amendment of the

Constitution of the United States, where the two offenses involved were violations of two separate and distinct Ohio statutes, where the legal elements of the two offenses are different; where the evidence offered to support each offense would have been insufficient to warrant a conviction of the other, and where the conviction or acquittal of one of these offenses could not have been pleaded in bar to a prosecution for the other?

(C) Was the Appellant deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States, when the trial court began its charge to the jury in the afternoon of one day and concluded the same on the following morning?

Respectfully submitted,

LYNN B. GRIFFITH, JR.,

Prosecuting Attorney in and for
Trumbull County, Ohio,

Attorney for Plaintiff-Appellee,
State of Ohio.

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 791.

STATE OF OHIO,
Appellee,

vs.

FRANK CICKELLI,
Appellant.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

I.

JUDGMENT APPEALED FROM DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

(a) **Selection of the Grand Jury.** This Court has "consistently held that there is no federal constitutional impediment to dispensing entirely with the Grand Jury in State prosecutions."[1] *Due process of law* as used in the Fourteenth Amendment is concerned with the basic fairness of procedure on the trial of the ultimate issue of guilt or innocence in a criminal case and not with the particular accusatory method by which such issue is joined in State Courts. If there be any exception to this general rule, it lies in the area of those cases in which the record of a criminal case discloses a systematic exclusion by law or practice of members of a particular race to which a defendant belongs. *E.g.*, *Reece v. Georgia*, 350 U. S. 85, 100 L.

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[1] *Beck v. Washington*, 369 U. S. 541, 8 L. ed. 2d 98, 82 S. Ct. 955; *Ocampo v. United States*, 234 U. S. 91, 58 L. ed. 1231, 34 S. Ct. 712 (1914); *Lem Woon v. Oregon*, 229 U. S. 586, 57 L. ed. 1340, 33 S. Ct. 783 (1913).

Ed. 77. The concern of the court in *Reece* and similar cases has been the denial of defendant's right to equal protection of the laws, and the violation of the basic concept of fairness involved in the due process clause. The line of cases represented by Reece has never indicated that the particular technicalities of procedure adopted by a state in impaneling a grand jury should be elevated to the status of a constitutional question. It may be observed in this regard that the alleged irregularities, as set out in the statutory sections cited in Appellant's brief, are largely technical in nature, and any possible violation of these statutes would not lead to impaneling of a grand jury which was either biased or which lacked the requisite qualifications to act as jurors. Nor is there any claim by the defendant that such bias or lack of qualifications was present in this case.

Even if constitutional protections afforded to the defendant extend to compliance with the technicalities in the manner of selection of a grand jury, it is clear that such rights must be asserted in accordance with the procedural rules of the State courts, unless these rules themselves violate some provision of the Federal Constitution. The record of this case clearly shows that the petitioner did not comply with the laws of Ohio in the manner of raising an objection of irregularities in the impaneling of the grand jury. Ohio Revised Code Section 2313.41 provides:

> "*A challenge of the array may be made* and the whole array set aside by the court *when the jury, grand or petit, was not selected*, drawn or summoned, or when the officer who executed the venire did not proceed as *prescribed by law*. No challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror; but on challenge, a juror may be set aside by reason of a misnomer in

his name; *but such challenge shall only be made before the jury is impaneled and sworn*, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer, if the jurors who formed the same possessed the requisite qualifications to act as jurors."

There is no question as to the qualifications of the grand jurors that indicted this defendant. No challenge to the array of this panel of grand jurors was made. The Ohio code is very specific in stating, "no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors."

Ohio Jurisprudence 2d discusses this matter in two places and states as follows:

15 *O. J.* 2d, 196:

"The lack of legal qualifications of grand jurors may be taken advantage of by a plea in abatement. But mere irregularities in selecting and drawing grand jurors which do not relate to or affect their personal qualifications as such, must be taken advantage of, if at all, by challenge for cause, and not by a plea in abatement."

26 *O. J.* 2d, 286:

"Technical defects and irregularities in the selecting, summoning and impaneling of a grand jury must, by express statutory provisions, be availed of, if at all, by challenge before the grand jury is impaneled and sworn."

A leading authority is the case of *State of Ohio v. Huling*, 17 O. S. 588, wherein the Court stated:

"Whether the latter kind of objection (objection to mere irregularities in the manner of selecting of grand jurors) can be taken by plea to the indictment, is a question upon which there has been much difference

of opinion and contrariety of decision. Since the decision of the case of *Doyle v. the State*, 17 Ohio 222 it has been settled law in Ohio that such a plea is good in all cases where the objection is to the qualification or competency of the individual jurors. This is as far as we have gone. We have never held and such is not the practice so far as we know, that mere objections to the *manner* of selecting and constituting the jury can be taken by plea in abatement. On the contrary, the practice is to require the objection to be taken by challenge for cause, either to the panel or to individual jurors."

In the case of *The State of Ohio v. Blaney*, 17 O. C. C. 486 exception was taken to the indictment, first by a motion to quash, and then by a plea in abatement which alleged defects and irregularities in selecting, drawing, summoning and impaneling the grand jury. The Court held:

"None of these things are of essence, and it is believed, unless they are, they cannot properly be made the basis of a motion to quash the indictment, or of a plea in abatement, but must, by express statutory provision, be availed of, if at all, by challenge before the jury is impaneled and sworn." (Sec. 5175 R. S. cited.)

A close reading of Section 5175 of the Revised Statutes discloses that it is with the exception of two or three minor words identical with Ohio Revised Code Section 2313.41. This rule was followed in the cases of *State v. Lindsey*, 4 O. C. C. N. S. 409, *State v. Dieter*, 81 O. S. 505, *State v. Lynch*, 5 O. S. 16 and *State v. Easter*, 30 O. S. 542.

In *State v. Roth*, 3 O. C. C. 59 on page 63 it is stated:

"In some of the States, challenge seems to be the only form in making the objection even where it goes to the personal disqualification of the jurors. The better opinion however is and the current of authority is to the effect that irregularities in selecting and im-

> paneling grand juries which do not go to their incompetency can be only objected to by way of challenge but that their individual incompetency may be pleaded in abatement to the indictment."

This is, and has been the law of Ohio since 1848. The defendant in this case having failed to challenge the array as prescribed by statute and thereby obtain a new panel cannot now complain after conviction, of any alleged irregularities.

Even if it be conceded, which Appellee emphatically does not, that the defendant had no opportunity for a challenge to the array because he was not informed by arrest or otherwise, that charges against him would be considered by the grand jury, and that such lack of opportunity for challenge to the array permitted him to raise the issue in another manner, the law of Ohio provides that if alleged irregularities in the selection of a grand jury may be objected to other than by challenge to the array it must be done by a plea in abatement.

Ohio Revised Code Section 2941.55 provides:

> "Plea in abatement may be made where there is a defect in the record shown by facts extrinsic thereto."

The rule is set out in 15 *O. J.* 2d 402 as follows:

> "The lack of legal qualifications of grand juries may be taken advantage of by a plea in abatement."

It appears that if defendant had an alternate method available to him of objecting to these alleged irregularities, it is by plea in abatement.

Ohio Revised Code Section 2941.59 provides:

> "The accused waives all defects which may be excepted to by a motion to quash or a plea in abatement by demurring to an indictment, or by pleading in bar or the general issue."

In *State of Ohio v. Detterline*, 15 O. N. P., N. S. 433, it was held:

> "A plea of abatement must be made prior to the plea of not guilty, and where it is discovered during the taking of testimony that the prosecuting witnesses have been incorrectly named in the indictment it is too late to interpose a plea of abatement."

In this case the defendant entered his plea of not guilty on October 17, 1961, with leave until October 20, 1961 to file motions. It was not until January 31, 1962 that his motion, which is difficult to define, was filed. Having entered his not guilty plea, defendant, by reason of O. R. C. 2941.59 waived any objection to the impaneling of the grand jury.

It is contended, in defendant's brief, that the motion to dismiss the indictment was timely made because there was an amendment to the indictment after he had entered a plea of not guilty. It is apparently defendant's contention that a new arraignment was required by this amendment and that therefore his motion to dismiss was timely made within the meaning of O. R. C. 2941.59 cited above.

As noted in the defendant's statement of the case, subsequent to the arraignment of the defendant and prior to trial, the trial court permitted the State to amend the indictment so as to conform with a bill of particulars requested by the defendant. Such amendment is permitted in Ohio by statute.[1] It may be noted that this statute permits the amendment of the indictment even after the trial, so that there is obviously no resubmission to the grand jury or rearraignment contemplated when an indictment is amended.

It must be emphasized that this amendment did not in any way change the identity of the crimes charged.

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[1] O. R. C. Section 2941.30.

With respect to the amendments involving crimes of which the defendant was convicted, the crimes remained the same, both before and after the amendment, i.e., bribery and obtaining money by false pretenses.

The defendant at no time, by motion or otherwise, objected to the amendment, asked that the words be stricken or make any complaint whatsoever with regard to this proceeding.

Since no rearraignment of the defendant was required either by the general law of the state or by the particular circumstances of the amendment, it is clear that the defendant's motion to dismiss was made after the arraignment and was therefore not timely. Though the defendant does not set forth in his jurisdictional statement under the heading of Questions Presented, the issue of the due process clause requiring the entry of a plea before a trial can proceed, he seeks to interject this issue in his argument. Appellee submits that for the reasons cited above no new plea was required to the amended indictment. In any event is is clear that the defendant is not now entitled to raise this issue for the reason that the same was not raised in the state courts. This fact of course precludes a consideration of this question at this time under Rule 15d which requires an appeal from a state court to set out in a statement of case a stage of the proceedings in the court of first instance and the appellate court and the manner in which the federal questions sought to be reviewed were raised, the methods of raising and the way in which they were passed upon by the court. Defendant's brief is void of any statement as to the time and manner of raising in the state courts the issue of pleading to an amended indictment.

If this issue were not disposed of by the foregoing, the record of this case contains no evidence of the alleged

irregularities in the selection of the grand jury. No evidence was presented in support of defendant's motion to dismiss the indictment for improper selection of the grand jury. There is nothing in the record to pass upon in this regard. Petitioner has attempted to incorporate by reference in his briefs in the Ohio courts and in this Court, matters raised in another case. Petitioner states in his brief that a motion was sustained in the unreported case of *State of Ohio v. Little* to the array of the petit jury. There is no opinion delivered in that case and certainly no finding of violations of all the statutes cited by the petitioner.

It is respectfully submitted that evidence of irregularities, if there were any, must appear in the record of this case if error is to be urged. This Court has held that even allegations of race discrimination in the selection of a grand jury must be supported by evidence in the record before it could pass upon the constitutional questions involved.[1]

(b) **Double Jeopardy.** Defendant was convicted of the violation of two Ohio statutes, 1. O. R. C. 2917.01, which defines the crime of bribery and proscribes the solicitation or acceptance of various public officers of things of value to influence official duties, and 2. O. R. C. 2907.21, which prohibits the obtaining of money by false pretenses. Defendant contends that his conviction on these two counts constituted double jeopardy in violation of the Fifth Amendment of the Constitution of the United States. Full understanding of this question requires a brief statement of fact. On May 7, 1961, one Raymond Little, a city councilman, aided and abetted by the defendant, solicited

[1] *Martin v. Texas*, 200 U. S. 316, 50 L. Ed. 497.

money from contractors who were to perform work in the City of Warren. The figure finally agreed upon was $35,000.00. This money was to be paid to the councilman and the defendant together, for two purposes. First, it was to influence the official action of the councilmen in voting on legislation involved in the letting of the contract in which the contractors were interested. Second, it was intended to influence the mayor and the executive branch of the city administration in their activities in relation to the contract.

The efficacy of paying money to the councilman was apparent and stemmed from his official position as one voting on legislation with respect to the contract. The payment to the defendant was based on the representations of the defendant that he was a representative of the mayor; representations which were false according to evidence presented at the trial. More than one hundred days after this solicitation, $10,000 was paid to one Paul Lamonge, a co-conspirator of the defendant. Nothing was paid to Councilman Little, nor were there remaining any official actions to be accomplished by city council with respect to the letting of the contract, though with the job under way there were still favors to be obtained from the city administration in its supervisory capacity with respect to the work.

With this brief outline of facts in mind, we may turn to the legal questions involved in the issue of double jeopardy. With respect to the violation of O. R. C. 2917.01, the bribery statute, it may be noted that defendant was not one of the officers listed in this statute, nor did he have any official duties which were intended to be influenced or which could have been influenced by the payment of this money nor did his co-conspirator, Paul Lamonge, who physically received the money, hold any such position.

The payment of the $10,000 to Lamonge could not, therefore, have constituted a bribe, since the recipients, Lamonge and Cickelli, had no official capacity in connection with the Warren Sewer Project. This was not money solicited by a public officer for the purpose of influencing official action, but rather money obtained by the false pretense of the defendant that he represented the mayor. On the other hand, it is to be noted that the solicitation which took place earlier by Councilman Little, which was aided and abetted by the defendant, did constitute the solicitation of a bribe because the money, or Little's share of it, was to be paid for the purpose of influencing an official action as a councilman of the City of Warren, contrary to the bribery statutes.

The true test of whether or not these convictions constitute double jeopardy is whether or not the conviction or acquittal of one of these offenses could have been pleaded in bar to a prosecution for the other. The test commonly applied is whether the evidence necessary to support the second offense would have been sufficient to warrant a conviction on the first. The state's evidence on the first count which was to the effect that the defendant aided Raymond Little in soliciting a bribe from the contractors to influence his vote on pending legislation. Such evidence would clearly not have supported a verdict nor even constituted a prima facie case with respect to a charge that the defendant had obtained money through a co-conspirator by means of false representations that he represented the mayor of the City of Warren. Even regarding single acts, the rule is clear that a single act may be an offense against two statutes, and if either statute requires proof of an additional fact an acquittal of the offense requiring proof of the additional fact does not exempt the defendant from prosecution and punishment under the statute which does

not require proof of such additional fact.[1] In the instant case, conviction on the first count required a showing of the official capacity of Mr. Little, the existence of future official action of his to be influenced and the request and solicitation of the money. None of these facts would be necessary to prove the state's case on the count of obtaining money by false pretenses. Conversely with respect to the fourth count, the state's case required proof of receipt of the money, the conspiracy between Lamonge and the defendant, the representations by the defendant that he represented the mayor, the effective operation of such representations in the minds of the contractors and the falsity of such representations. All of which facts were unnecessary to the state's case on the bribery count.

It has been consistently held that the double jeopardy prohibition of the Fifth Amendment to the Federal Constitution is not one of the fundamental protections required of the states by due process provisions of the Fourteenth Amendment, unless a particular kind of double jeopardy subjects the state defendant to a hardship so acute and shocking as to violate the concept of order liberty which lies at the base of our civil and political institutions.[2] Nothing in the due process clause of the Federal constitution prevents the state from construing the double jeopardy clause of its own state constitution to the effect that double jeopardy under a state constitution would not apply unless the same evidence necessary to sustain the second indictment would have been necessary to secure a conviction on the first.[3] The factual and legal

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[1] *Duval v. State*, 111 O. S. 657.

[2] *Johnson v. Rahy*, 266 Fed. 2d 230; *U. S. ex rel. Martin v. Walker*, 111 F. Supp. 455, aff. 203 Fed. 2d 563.

[3] *Hope v. State of New Jersey*, 356 U. S. 464, 2 L. ed. 2d 912.

differences involved in these two counts eliminate any question of double jeopardy.

(c) **Adjournment During the Charge and Re-Definition of Terms by the Court.** With respect to Appellant's complaint that the court's charge to the jury was interrupted by a daily adjournment, appellee knows of no authority for the proposition that such procedure is prohibited by state law, nor is any such authority cited by the defendant. This issue was heard and decided in this case by the Ohio Supreme Court, which apparently found that O. R. C. 2945.10, cited by the defendant, did not require a continuous charge. Certainly there is nothing inherently unfair, illegal or improper about adjourning court at an appropriate time during the day although such adjournment results in a division of the charge. In no event can the propriety of such procedure be considered to be raised to the level of a constitutional question under the due process clause of the Fourteenth Amendment.

Similarly, it is submitted that the practice of correction, re-definition and clarification of the charge with due respect to certain elements of the crime, present no federal question arising under the constitution.

Defendant does not indicate in what way he may have been prejudiced by the practice complained of, except to hint that confining the second day's charge to the elements of the crime resulted in an emphasis of that aspect of the charge. This reasoning seems to be based on the premise that a description of the elements of the crime is a benefit to the prosecution and deleterious to the defense. It might just as easily be argued that the converse would be true, since the precise definition of the elements necessary to be found to support a finding of guilty emphasizes the necessity for the prosecution to carry its

burden of proof in several particular areas, rather than by any general impression of guilt. It may be further noted that the defendant made no request for a repetition of instructions of the previous day, for example with respect to the presumption of innocence or reasonable doubt, the omission of which he now complains.

CONCLUSION.

It is is respectfully submitted that this appeal is subject to a motion to dismiss. It does not present a substantial Federal Question.

Respectfully submitted,

LYNN B. GRIFFITH, JR.,

Prosecuting Attorney in and for Trumbull County, Ohio,

Attorney for Plaintiff-Appellee, State of Ohio.

APPENDIX I.

STATUTES.

O. R. C. 2313.41—Array may be set aside.

A challenge to the array may be made and the whole array set aside by the court when the jury, grand or petit, was not selected, drawn, or summoned, or when the officer who executed the venire did not proceed as prescribed by law. No challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror; but on challenge, a juror may be set aside by reason of a misnomer in his name; but such challenge shall only be made before the jury is impaneled and sworn, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors.

O. R. C. 2907.21—Larceny by Trick.

No person shall obtain possession of, or title to, anything of value with the consent of the person from whom he obtained it, provided he induced such consent by false or fraudulent representation, pretense, token, or writing.

Whoever violates this section is guilty of larceny by trick, and, if the value of the thing so obtained is sixty dollars or more, shall be imprisoned not less than one nor more than seven years. If the value is less than sixty dollars, such person shall be fined not more than three hundred dollars or imprisoned not more than ninety days, or both.

O. R. C. 2917.01—Bribery.

No person shall corruptly give, promise, or offer to a member or officer of the general assembly or to a state, judicial, or other officer, public trustee, or an agent or

employee of the state or of such officer or trustee, either before or after his election, qualification, appointment, or employment, any valuable thing, or corruptly offer or promise to do any act beneficial to such person to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in a matter pending, or that might legally come before him. No member of the general assembly, or a state officer or other officer, public trustee, agent, or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment or employment, shall solicit or accept any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in a matter pending, or that might legally come before him.

Whoever violates this section shall be imprisoned not less than one nor more than ten years.

A person convicted under this section is disqualified from holding any public office or appointment under this state, and, if not a state officer, shall be removed from office or employment by order of the court.

O. R. C. 2941.30—Amending an indictment.

The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment or information or to cure a variance between the indictment or information and the proof, the accused is entitled to a discharge of the jury on his motion, if a jury has been impaneled, and to a reasonable continuance of the cause, unless it clearly

appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. In case a jury is discharged from further consideration of a case under this section, the accused was not in jeopardy. No action of the court in refusing a continuance or postponement under this section is reviewable except after motion to and refusal by the trial court to grant a new trial therefor, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted.

O. R. C. 2945.10—Order of proceedings of trial.

The trial of an issue upon an indictment or information shall proceed before the trial court or jury as follows:

* * * * *

(G) The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury. Such charge shall be reduced to writing by the court if either party requests it before the argument to the jury is commenced. Such charge, or other charge or instruction provided for in this section, when so written and given, shall not be orally qualified, modified, or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.

The court may deviate from the order of proceedings listed in this section.

O. R. C. 2941.55—Plea in abatement.

Plea in abatement may be made when there is a defect in the record shown by facts extrinsic thereto.

O. R. C. 2941.59—Waiver of defects.

The accused waives all defects which may be excepted to by a motion to quash or a plea in abatement, by demurring to an indictment, or by pleading in bar or the general issue.

APPENDIX II.

APPELLANT'S ASSIGNMENT OF ERRORS IN THE SUPREME COURT OF OHIO.

1. Defendant was deprived of his rights under the Constitution of the State of Ohio and the Constitution of the United States of America by the Court's overruling Defendant's motion to dismiss the indictment against Defendant for the reason that the panel of persons drawn to serve as Grand Jurors was not selected according to law and was improperly drawn.

2. The Court of Appeals, in reviewing the case upon the weight of the evidence, did not determine whether the verdict was supported by the degree of proof required in criminal cases.

3. The verdict of the jury is contrary to law and against the manifest weight of the evidence.

4. The Court erred in its charge to the jury.

5. The Court erred in permitting the introduction by the State of evidence of conversation between witnesses and third parties at which Defendant was not present, when no proper foundation had been laid and there was no proof of conspiracy.

6. Error of the Court in continuing his charge to the jury, contrary to prior agreement between counsel and the Court.

7. The indictment of Defendant on two counts arising out of the same subject matter or same transaction is a violation of Defendant's right under the Constitution of the State of Ohio and the Constitution of the United States of America, not to be twice put in jeopardy for the same offense and the Court erred in sentencing Defendant on more than one Count in the indictment.